

QUESTION

A & B are two homosexuals who have lived together for a number of years. Also living with them is C, who, while aged 30 is mentally abnormal and has a mental age of 10. A and B have cared for C for 2 years since C's remaining parent, an old friend of theirs, died. C cannot look after himself very well and occasionally goes through periods of deep depression. One day, A thinking that C might learn how to bake a cake, shows C how to mix ingredients and use the gas oven. He then goes to the shops to buy some decorations "to surprise B". When A gets back he finds C lying unconscious on the kitchen floor. There is a strong smell of gas. A rushes out to a telephone box to ring B. Meanwhile B arrives home and from smelling the gas and seeing the state of C, thinks that C had committed suicide. Fearing for his legal safety he hides C in a cupboard where C suffocates to death.

Advice A and B.

SUGGESTED SOLUTION

A & B are advised that the state acting under prerogative via the Crown Prosecution Service will seek to juxtapose their actions with the existing scope of the law. Congruence will lead to a conviction of the charge. The charge here is submitted to be in the realm of homicide since there is a fatality upon C. Thus it is the Crown's burden to prove the unlawful killing with the intention to kill or cause grievous bodily harm beyond a reasonable doubt. **DPP v Woolmington**. The crown would need here to satisfy both the legal and evidential burden since A and B until then can enjoy the presumption of innocence.

Upon a perusal of the facts, A and B cannot be jointly charged since their elements differ. They would therefore be joint principals. **R v Muhammad**. **Smith v Hogan** argues that to satisfy the burden the crown would have to prove the actus reus and the mens rea concurrently as well as an absence of a defence. Their liabilities will be demarcated inturn.

A's charge will lead the prosecution using the doctrine of 'first in time'. It is submitted that his actus reus for the unlawful killing is made out by an omission. Due to the nature of the charge an omission will be derivative which requires a legal duty and factual omission. The legal duty available proof here would be common law based in tandem with a voluntary assumption of responsibility. **R v Nicholls** is satisfied since C can be classified as infirmed being mentally abnormal with a mental age of 10 being 30. There is an implied assumption of responsibility that demonstrates consistency since A had taken care of C for 2 years. **R v Smith**. There is no evidence of a rejection **Ret** or an impossibility to take care of C knowledge being irrelevant . **R v Morby**.

Having proven the actus reus, the prosecution will now prove that the actus reus caused the consequence. Causation is proven factually and legally. Factually causation utilizes the but for test in **R v White**. Here but for the actus reus of failing to take care of C, C would not have been rendered unconscious resulting in B's belief and act of placing C in the cupboard suffocating him. Thus but for the actus reus death would not have occurred.

Legal causation must establish that A is the operative and substantive cause of death. It is submitted to be operative since the actus reus is singular **R v Hennigan**; and further this operative cause is a substantial cause of the aforementioned fatality since it set the tone for the consequence. **R v Pagett**. The judgement in **R v Cheshire** argued in tandem that a significant contribution suffices to render A causatively liable as is submitted on the facts.

A may argue that B's acts are to break in his chain of causation being a third party novus actus interveniens. If this is argued then the exception under **R v Pagett** must be applied. Here Lord Diplock submits that if B's actions are directly related to A's actus reus then the chain is not broken. Factually B's actions are congruently attributable to A's omission. Thus it is submitted that A is still legally and factually the cause of death.

The prosecution will then wish to establish a conviction of murder. To do so they will need to prove an intention to kill or cause grievous bodily harm. This can be proven via a direct intent or an inferred intent. A direct intent follows the **Moloney direction** whereby A must foresee the probability of C's death or grievous bodily harm upon him to be little short of overwhelming. This intention must be concurrent with the actus reus thus is judged at the time of the omission, **Fagan v Metropolitan Police Commissioner**.

Using the **Moloney direction** as specified it is unlikely A would foresee the consequence on the standard required. Looking at inferred intention along the **Nedrick / Wollin test** it is argued that it to will not be able to be proven since it is unlikely A realized the consequence to be virtually certain (barring any unforeseen circumstances). Thus murder cannot be made out on A's account. The prosecution will thus render an alternative conviction of involuntary manslaughter. Here it is within the realm of gross negligence manslaughter. Following the test crafted in **R v Bateman** then affirmed in **R v Adomako** the prosecution must first prove a duty of care which is then breached causing the consequence. The act must too be grossly negligent.

A duty of care requires some special skill to be administered in a fashion that goes beyond a mere matter of compensation thus risking the health and safety of the victim through this grossly negligent act or omission. On the facts there is no special skill that is attributable to A. This line thus will fail.

The only possible alternative for the crown prosecution service will be rescued the charge of reckless manslaughter now held in abeyance. It is theoretically still applicable since it was only expressly overruled in its application of motor manslaughter, **R v Seymour** and it was not expressly abrogant (implied repeal) does not apply here. Further in the recent **Law Commission Report No. 245** which culminated into the involuntary manslaughter bill, reckless manslaughter was put forth albeit in a hybrid form.

Reckless manslaughter utilizes the **Caldwell / Lawrence / Reid direction**. A must have first created a serious obvious risk. According to **R v Stephen Malcolm**, this is an objective test using a reasonable man with no expert knowledge. Here objectively A creates a serious risk since it is a gas even and it's a risk which is obvious in light of C being mentally arrested, aged 30 with a mental age of 10, **Elliot v C**. A then does not realize this serious obvious risk **R v Reid**, as he then goes of shopping thus the two limbs are proven. The lacunae is submitted not to apply and thus A can be convicted for reckless manslaughter. The charge here would be maximum life imprisonment.

In regard to D his acts correspond with a positive act of packing C in the cupboard. This will be noted to be conscious and voluntary, **Bratty v AG for Northern Ireland**. In tandem B will also be argued to have created a dangerous situation via a common law derivative omission. Following the case of **R v Miller** B had created the risk of suffocation towards C inadvertently and realized the risk only subsequently. He did not take any action to reduce or prevent the risk which was not impossible. **R v Morby**. Thus B will have both a positive act and an omission, **R v Roberts**.

In looking at causation it can be established that but for B's act of placing C in the cupboard C would not have suffocated to death, **R v White**. This is the operative and substantive case to death, **R v Swindall & Osborne**. There is no novus actus interveniens that B can raise. Proving the mens rea for B the crown will have a problem in that when C is put the cupboard B believed that he was dead thus there is no consequence between actus reus and mens rea, **R v Church**. Further there can be no intention for murder since B in believing C was dead cannot foresee the probability of death / GBH to someone who has already died; much less on a standard of little short of overwhelming **R v Moloney**. Furthermore the implied intention found in the **Nedrick / Woollin** direction too will not stick since its improbable B would foresee virtually certainly that C would die.

In the alternative a verdict of involuntary manslaughter will be sought. Here constructive manslaughter is most congruent to the facts. First there is an unlawful positive act in the act of placing C in the cupboard **R v Larkin**. It is unlawful being a crime under battery, **R v Armstrong**. This act is unlawfully dangerous since it risks asphyxia, **R v Church**. The objective standard this is satisfied. This act was the cause of the fatality as on the facts he suffocated. Following **DPP v Newsbury** it is submitted that B did intend the unlawful act of placing him in the cupboard. Thus constructive manslaughter is satisfied. It is submitted that there will be a verdict of manslaughter on a charge of homicide rendering a maximum life sentence.